IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9250 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMESHCHANDRA CHAMPAKLAL BHATTWALA

Versus

SURAT MUNICIPAL CORPORATION

Appearance:

Mr.ND NANAVATI for NANAVATY ADVOCATES for Petitioner

MR PRASHANT G DESAI for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 18/12/2000

C.A.V. JUDGEMENT

1. Affidavits having been exchanged, with the consent of the learned Counsel for the petitioner and the

respondent, this petition is proposed to be disposed of finally at the admission stage.

2. The prayer of the petitioner in this writ petition is for a mandamus directing the respondents Authorities to give vacant possession of Final Plot Nos.47/A and 47/B, total measuring 26662 sq.mtrs. at Katargam forming part of Town Planning Scheme No.IV, Surat. The other relief is for a direction restraining the respondents from further implementing the scheme relating to the original plot No.47 of town planning Scheme No.Surat IV.

3. Brief facts giving rise to this petition are as under :

After reconstitution of Plot No.47 of Revenue Survey Nos.363/1 and 363/2 situated at Katargam forming part of Town Planning scheme (Surat) No.IV, Final Plot Nos.47/A and 47/B were allotted to the petitioner. The petitioner was the owner and occupier of the aforesaid survey numbers. The respondents Authorities declared its intention to publish a scheme under the Bombay Town Planning Act, 1956 (Old Act) on 17.3.1967. The said scheme was sanctioned by the State Government u/s.65 on 12.12.1980. In the draft town planning scheme the petitioner was allotted final plot No.40, 40A and 40B, the total area of land in question was mentioned as 34690 sq.mtrs. In lieu of said original plot No.40 the petitioner was allotted final plot No.40-A and 40-B measuring 21069 sq.mtrs. and 3511 sq.mtrs., total 24580 sq.mtrs. Thereafter the Town Planning Officer drew preliminary scheme and ultimately the petitioner had been allotted final plot Nos.47/A and 47/B measuring area as 34792 sq.mtrs. The petitioner was, however, allotted final plot No.47/A, area 22730 sq.mtrs., and final plot No.47/B, area 3392 sq.mtrs., and in this way the total area allotted to the petitioner was 26622 sq.mtrs. The petitioner's grievance is that the area of original plot has been considerably reduced. It is alleged that while reconstituting the original plot of the petitioner remaining land of the petitioner has been reserved for sub-centre, multi-purpose of the open space and primary school and part of the petitioner's land is also forming part of town planning road. Feeling aggrieved from such reservation/allocation in the town planning scheme the petitioner filed Civil Suit No.234/94 in the Court of Civil Judge (SD), Surat and applied for injunction. Injunction was not granted hence the petitioner filed Civil Misc. Appeal No.139 of 1997. It was also dismissed. Thereafter the petitioner filed writ petition being Special Civil Application No.4680 of 1998 before

this Court challenging the reservation in the allocation of the land in scheme. The Civil Suit was withdrawn by the petitioner whereupon this Court in the Special Civil Application aforesaid passed an order on 19.11.1998 admitting the said petition. Thereafter nothing has happened in that petition. The grievance of the petitioner in this petition is that the respondents Authorities have failed and neglgected and have not allotted the total area of 26622 sq.mtrs. of final plot Nos.47/A and 47/B and have also not given possession of final plots allotted to the petitioner. Alleging inaction of the respondent Corporation in delivering possession of aforesaid area this petition was filed with prayers mentioned above.

4. It appears from the record that in relief (B) of the petition total area of final plot Nos.47/A and 47/B measuring 26662 sq.mtrs. is wrongly mentioned due to typographical error. From the counter Affidavit of Shri Shishikant T. Dasadiya from the respondent Corporation it appears that total area of aforesaid final plot is 26622 sq.mtrs. which was admitted by Shri N.D.Nanavati, learned Counsel for the petitioner in the course of his argument. Consequently the total area of final plot Nos.47/A and 47/B has to be treated as 26622 sq.mtrs.

5. The stand of the respondent Corporation in the counter Affidavit is that the scheme having become final cannot be challenged by the petitioner and all rights and interest of the original owner have been extinguished on the scheme becoming final. In this counter Affidavit mention is also made of Regular Civil Suit, Miscellaneous Civil Appeal and writ petition mentioned in the for-going portion of this Judgment.

6. Since there was controversy whether possession of entire plot allotted to the petitioner was given to the petitioner or not this Court on 21.2.2000 ordered, with the consent of the learned Counsel for the parties, that the District Inspector Land Records to measure final plot Nos.47/A and 47/B of the town planning scheme No.IV, Surat. Final direction was that the D.I.L.R., Surat,is directed to measure aforesaid plot and he shall indicate area in the square meters. Further direction was that he shall submit measurement duly certified within four weeks. In compliance of this direction the D.I.L.R. carried out measurement and submitted map with index which forms part of the record. According to this map and Index prepared by the D.I.L.R. it was found that in final plot No.47/A and 47/B of Town planning scheme the total are allotted to the petitioner was 22730 sq.mtrs.

and 3892 sq.mtrs., the total being 26622 sq.mtrs. On measurement he found that the petitioner was in actual possession of 21565.33 sq.mtrs. of plot No.47/A and 3694.81 sq.mtrs. of Final Plot No.47/B, the total being 25260.14 sq.mtrs. The difference was 1164.67 sq.mtrs. in final plot No.47/A and 197.19 sq.mtrs. in final plot No.47/B. Hence total difference of possession was 1361.86 sq.mtrs.

7. After this report and map another Affidavit of Shri P.R.Jasani, Deputy Engineer of the Corporation, was filed in which it was stated that the Corporation does not admit the said report of D.I.L.R. because it is not in consonence with the town planning scheme which has become final and part of the Act, and the petitioner is stopped from stating that any less area is given to the petitioner under the town planning scheme.

8. Shri N.D.Nanavati for the petitioner and Shri Prashant G. Desai for the respondents were heard and the Affidavit, Counter Affidavits and the map and the report of D.I.L.R. have been examined and considered.

9. The short point for consideration is whether the petitioner was given actual possession of 26622 sq.mtrs. in the two final plot Nos.47/A and 47/B or not.

10. Shri N.D.Nanavati for the petitioner has, in the beginning of the argument, admitted that the total area allotted to the petitioner in the two plots was 26622 sq.mtrs. On this point there is no dispute. The mistake in Relief (B) has thus to be clarified on this line. The prayer in the petition is for giving possession of 26662 sq.mtrs. of land of the two plots which is incorrect and it has to be read as 26622 sq.mtrs.

11. Shri Nanavati further admitted in the course of argument that the petitioners are in possession of 25260.14 sq.mtrs. of land. Consequently the entire relief (B) cannot be granted. According to Shri Nanavati now the petitioner is to be delivered possession of remaining area of land in the two plots admeasuring 1164.67 sq.mtrs. and 197.19 sq.mtrs., total 1361.86 sq.mtrs. in the aforesaid two plots. Shri Nanavati also relied upon the map and index prepared by the D.I.L.R. It may be mentioned that the D.I.L.R. is a Government Officer and not a private surveyor. More over this officer was directed to carry out measurement under the orders of this Court passed on 21.2.2000. Consequently his report cannot be lightly brushed aside simply on the objection raised in the counter Affidavit that the

Corporation is not bound by the map prepared and measurement made by the D.I.L.R. As stated earlier this officer is a Government Officer and carried out measurement under the orders of this Court. The grievance of Shri P.G.Desai was that no officer of the Corporation was informed by D.I.L.R. of his intention to carry out measurement and also the date and time of carrying out measurement, and since the measurement was not done in presence of any officer of the respondent it has no value. However, no map to the contrary has been filed along with the counter Affidavit that the actual position on the spot is something different from what has been shown in the map by the D.I.L.R. This could have been easily done. Mere statement that the entire area was handed over to the petitioner cannot be accepted in face of this report of D.I.L.R. which speaks that the petitioner has not been delivered possession of 1164.67 sq.mtrs. of land of final plot No.47/A and 197.19 sq.mtrs. of land of final plot No.47/B, total admeasuring 1361.86 sq.mtrs.

12. Shri P.G.Desai further contended that the Corporation is bound only by the Town Planning Scheme and not by the measurement done by the D.I.L.R. This contention cannot be accepted for two reasons. Firstly the measurements were done by D.I.L.R. under the orders of this Court and no map to the contrary has been filed by the respondent to show that the map prepared by the D.I.L.R. is incorrect or is unduly favouring the petitioner. There is no reason why the Government Officer would have carried out incorrect measurement especially when he was required to do it under the orders of this Court. Secondly if comparision of the map prepared by the D.I.L.R. is done with the true copy of blue print filed by the respondent along with counter Affidavit of Shri P.R.Jasani it can be said that there is no contradiction in the two maps. Actual position at present has been shown in the map of the D.I.L.R.

13. Shri Nanavati has fairly contended that the petitioner is not making any claim over the land which has been reserved for road. In face of this there seems to be no inaccuracy in the map prepared by the D.I.L.R.

14. Shri P.G.Desai further contended on the strength of some letter in his file that the petitioner was given possession of excess land admeasuring 27160.45 sq.mtrs. This contention canot be accepted, firstly because the said letter has not been filed as Annexure to the counter affidavit or by way of supplementary counter Affidavit annexing the said letter, nor copy of this letter was

given to the petitioner's counsel. More over in the two Counter Affidavit filed by the respondent there is no mention that possession of excess area of land was delivered to the petitioner. This is nothing but an after-thought to defeat the claim of the petitioner. If the petitioner was given excess land in possession then there was no reason why this fact was not mentioned in the two counter Affidavits filed on behalf of the respondent. It also looks improbable that if possession of excess land was delivered to the petitioner no action would have been taken by the respondent against the petitioner for recovery of possession of excess land delivered to him. For this reason also the contention of Shri P.G.Desai that actually the petitioner was given excess land cannot be accepted.

15. Shri P.G.Desai further argued that it is a disputed question of fact as to what area of land was actually given in possession of the petitioner and such disputed question of fact cannot be decided in exercise of jurisdiction of this Court under Article 226 of the Constitution of India. It may be mentioned that disputed question of fact cannot be decided in exercise of jurisdiction under Article 226 of the Constitution of India but such disputed question should be of the nature where evidence is required for its determination. However, if dispute for the sake of dispute is raised it cannot be said to be disputed question of fact. In no where in the first Affidavit it was deposed from the side of the respondent that the petitioner was delivered possession of 26622 sq.mtrs. of land of plot Nos.47/A and 47/B. Likewise no such clear statement was made in the second Affidavit filed on behalf of the respondent. Belated argument that possession of 27160.45 sq.mtrs. of land was given to the petitioner itself shows the disputed question of fact is raised for the sake of dispute and not that it is real dispute inasmuch as in the two Affidavits filed by the respondent nowhere it was stated that the petitioner was given possession of 27160.45 sq.mtrs. It may also be mentioned that the material alleging delivery of possession of excess land has also not been brought on record by the respondent. On the other hand it is not a disputed fact that the petitioner was allotted 26622 sq.mtrs. of land in two plot Nos.47/A and 47/B. From the report of the D.I.L.R. it is now clear that the petitioner is in possession of 25260.14 sq.mtrs. of land and he is short in possession by 1361.86 sq.mtrs. of land. There is thus no disputed question of fact which requires adjudication. On the other hand there is prima facie material in the nature of map and report of D.I.L.R. that the petitioner has to be

given possession of 1361.86 sq.mtrs. of land in the light of shortage of land in two plots given in the index of the map prepared by D.I.L.R.

16. Shri P.G.Desai further contended that this is 3rd round of litigation hence the writ petition is malafide and suffers from the vice of latches and delay. According to him the Town Planning Scheme was sanctioned in the year 1981 whereas this petition was filed in the year 1999. Hence on the ground of delay the petition should be dismissed. It was further contended by him that the petitioner had also filed Civil Suit in which he failed to get injunction order and in Miscellaneous Civil Appeal also he failed to get injunction order and that in the writ petition filed in this Court also no interim order was granted in his favour. To this, argument of Shri N.D.Nanavati has rightly pointed out that in the Civil Suit No.234/94 as well as in the Misc. Civil Appeal No.139/97 and Special Civil Application No.4680/98 reservation was challenged and not the dispute was raised about the actual delivery of possession. For this Paras : 3.5 and 3.6 of the petition can be referred. The Suit was ultimately withdrawn and not that it was dismissed on merits as contended by Shri Desai. This fact is also mentioned in Para : 3.6 of the petition which has not been controverted. The Civil Suit was withdrawn with a view to get Special Civil Application No.4680/98 admitted. The said petition has been admitted and is pending where no interim order has been passed. Consequently the earlier litigation in Civil Court and in this Court was for challenging the reservation in the allocation of land in the scheme and not that the dispute of actual delivery of possession of land to the petitioner was raised. Consequently those ligitations can not stand in the way of the petitioner.

17. Since the respondents were not delivering possession of entire land of final plot No.47/A and 47/B to the petitioner despite repeated request this petition was filed when the petitioner felt that the Authorities of the respondents were not taking any action for delivery of possession of the entire land to him. If in this backgraound the writ petition was filed in the year 1999 it cannot be dismissed on grounds of delay and latches.

18. In view of the aforesaid discussion it is clear that the petitioner is not entitled to recover possession of 26662 or 26622 sq.mtrs. of land of plot Nos.47/A and 47/B. However, in view of the report of D.I.L.R. the petitioner is entitled to recover possession of 1164.67

sq.mtrs. of land of final plot No.47/A and 197.19 sq.mtrs. of land of final plot No.47/B, total 1361.86 sq.mtrs. of land from the respondent, to make good the deficiency in total area of 26622 sq.mtrs. land allotted to the petitioner.

19. The petition, therefore, partly succeeds and is partly allowed. The respondents No.1 & 2 are directed to deliver actual, physical possession of the area of land of 1164.67 sq.mtrs. of final plot No.47/A and 197.19 sq.mtrs. of final plot No.47/B, i.e. total 1361.86 sq.mtrs. to the petitioner within a period of three weeks from today. No order as to costs.

sd/-

Date : December 18, 2000 (D. C. Srivastava, J.)

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